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NO. 82-1115

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

CITY OF WILLOUGHBY HILLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

ROBERT J. KONDRAT, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone: (216) 944 0140
Petitioner

ABRAHAM CANTOR, Counsel of Record
BYRON & CANTOR
Suite 330
36100 Euclid Avenue
Willoughby, OH 44094
Telephone: (216) 951 2303
Attorney for Respondent

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REPLY ARGUMENT

REPLY TO RESPONDENT'S NO. ONE ARGUMENT: The Respondent has argued that Petitioner's property had not decreased in value. Evidence in the record will show that for the tax year of 1976, Petitioner's property was devalued from $13,860 down to $9,810. For the convenience of the court, this evidence is presented again and may be found at the end of Petitioner's Reply Brief.

Respondent's thrust has been a claim for immunity from suit. In support of his claim, various state cases were given. The Petitioner argues that the Respondent is not immune from suit because Respondent's cited state cases have been superseded. In the consolidated case of Haverlack v. Portage Homes, Inc. (1982), 2 Ohio St. 3d 26, the Ohio Supreme Court rendered a decision that abrogated the immunity doctrine in the state of Ohio. For this court's convenience, the opinion of that case is included herein.

Furthermore, Petitioner argues that in the case of Monel v. New York City Department of Social Services, U.S. Sup Crt., 75-1914, 1978, the high court

held that local governments, municipal corporations, and school boards were "persons" subject to liability. Consequently, the Respondent's claim for immunity is not appropriate and therefore is to be denied.

REPLY TO RESPONDENT'S NO. TWO ARGUMENT: The Respondent has argued that the conduct of an administrative judge who causes the assignment of a case to a visiting judge does not prejudice the rights of a party. In support of Respondent's argument, various state rules of superintendance and civil procedure were cited. The Petitioner argues that prejudice cannot be erased by rules of superintendance and civil procedure. Its a fact that the assignment judge was the Petitioner's adversary in other pending litigation. And, its a fact that this same adversary had a direct role in determining what judge would hear this captioned case. An adversary who has a direct hand in being able to steer a case in whatever direction he desires, can affect the outcome of that case. Its no secret that some judges can be highly opinionated on different issues. This behavior has a profound affect on their decision making process. So, regardless of

whatever rules of superintendance and civil procedure are employed, the fact remains that an assignment judge can prejudice a case with his selection of a trial judge. The assignment judge should have removed himself completely from this case because of his involvement in litigation with Petitioner.

The Respondent has argued that Petitioner raises for the first time in this proceeding, that he could not obtain counsel to represent his interests. Petitioner argues that this is not the first time. Petitioner has raised this before in the lower court and the record will show it.

REPLY TO RESPONDENT'S NO. THREE ARGUMENT: The Respondent has argued that Petitioner attempts to involve Sixth Amendment considerations. Nothing could be further from the truth. The record will show that Petitioner has not involved the Sixth Amendment. Petitioner's questions presented for review clearly show that the constitutional provision involved is the Fourteenth Amendment. Cases cited in Petitioner's argument has been restricted solely to the Fourteenth Amendment. If Sixth Amendment considerations are involved, the Petitioner would like to know where this is.

CONCLUSION

The Respondent's arguments should be dismissed because there is no basis for them, and, Petitioner requests that the Writ of Certiorari be granted.

Respectfully Submitted,

Robert J. Kondrat, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944 0140

City of Willoughby Hills, OH
Abraham Cantor
Byron & Cantor
36100 Euclid Avenue/Suite 330
Willoughby, OH 44094
Telephone (216) 951-2303

Attorney for Respondent

Respondent's order prohibiting appellee from publishing information gathered in open court was not issued in conformity with the *Nebraska* test. The judgment of the court of appeals granting the writ of prohibition is accordingly affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES and C. BROWN, JJ., concur.

KRUPANSKY, J., not participating.

HAVERLACK ET AL., APPELLANTS, *v.* PORTAGE HOMES, INC., ET AL., APPELLEES.

RICHNER ET AL., APPELLANTS, *v.* PORTAGE HOMES, INC., ET AL., APPELLEES.

[Cite as Haverlack *v.* Portage Homes, Inc. (1982), 2 Ohio St. 3d 26.]

Municipal corporations—Negligent operation of sewage treatment plant—Defense of sovereign immunity not available, when—Administrative law—Administrative remedies before Environmental Protection Agency need not be exhausted, when—R.C. 3704.09.

O.Jur 2d Pollution Control § 54.

1. Pursuant to R.C. 3704.09, it is not necessary for a private citizen to pursue and exhaust his administrative remedies with the Ohio Environmental Protection Agency before initiating court action for money damages caused by a sewage treatment plant.

O.Jur 3d Counties etc. §§ 650, 651.

2. The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant.

(Nos. 81-1683 and 81-1784—Decided December 15, 1982.)

APPEALS from the Court of Appeals for Portage County.

In 1972, construction of a sewage treatment plant was commenced by Portage Homes, Inc., Manuel Barenholtz and Walden Co. Ltd., collectively "Walden," appellees herein. Although the plant was built to service the eight hundred-acre residential complex known as Walden, the plant was located outside the development on 4.99 acres of land owned by Portage Homes. The

treatment plant was operated for the benefit of Walden by the city of Aurora, appellee herein, pursuant to a permit issued by the Ohio Environmental Protection Agency ("EPA").

Following the construction of, but prior to the second expansion of the plant, neighboring landowners, Frank and Harriet Haverlack and Robert and Virginia Richner, appellants herein, objected to the plant's location and to the noise and odors emitted from the plant. Separate complaints were filed in the Court of Common Pleas of Portage County on August 30, 1978 by the Haverlacks and on February 22, 1979 by the Richners. The defendants in both suits were Walden and the city of Aurora. The complaints alleged, *inter alia*, injuries caused by odor and noise from the sewage treatment plant located adjacent to their properties (within two hundred and four hundred feet of Haverlacks' and Richners' residences, respectively) and sought damages for both past and future injuries and an injunction of the alleged nuisance. The complaints also alleged that the odor and noise had increased due to the expansion of the plant. The capacity of the facility was enlarged from an initial capacity of eighty thousand gallons to three hundred twenty thousand gallons per day at the time the complaints were filed.

Walden moved for summary judgment on the ground of failure to exhaust administrative remedies provided before the EPA. The city of Aurora also moved for summary judgment based upon the failure to exhaust administrative remedies and sovereign immunity. The trial court sustained both motions in each case. The court of appeals affirmed the granting of summary judgments in favor of the city, but modified the judgments to a dismissal of the complaints against Walden.

The causes are now before this court pursuant to the allowance of motions to certify the record.

Messers. Loomis, Poland, Wilson & Griffith and *Mr. Harry L. Griffith*, for appellants in case No. 81-1683.

Mr. R. Andrew Richner, for appellants in case No. 81-1784.

Mr. John H. Gibbon, director of law, for appellee city of Aurora.

Messrs. Williams, Zumkehr, & Welser, Mr. Benito C. R. Antognoli and *Mr. Charles E. Zumkehr*, for appellees Walden.

CELEBREZZE, C.J. These appeals require that we review the decisions of the court of appeals to ascertain if it was correct in affirming the granting of summary judgments against the appellants. Because the facts and issues presented are similar, the cases have been consolidated.

I

The initial question for our consideration is whether summary judgments were properly granted on the ground of failure to exhaust administrative remedies. The court of appeals, in *Haverlack*, concluded that "[t]he subject matter of appellants' complaint is clearly within the province of the Environmental Protection Agency and the evidence before the court clearly in-

dicated appellants failed to exhaust their administrative remedy before said state agency."[1] For the following reasons, we conclude that it is unnecessary to exhaust administrative remedies and consequently summary judgments were improperly granted.

Appellants maintain that it is unnecessary to pursue their remedies with the EPA before filing a complaint for judicial action. They contend that pursuing the administrative process would be futile because the EPA cannot consider the issue of a nuisance and has no authority to award the money damages they seek.

Conversely, appellees contend that complaints related to pollution should be initially addressed to the EPA and that it is necessary to exhaust this administrative remedy prior to judicial action. They argue that the EPA has the necessary technical expertise to determine the existence of the alleged pollution.

We conclude that it is unnecessary for appellants to pursue administrative remedies prior to initiating judicial action. We find that R.C. 3704.09 disposes of this issue. It provides that:

"Determinations made by the director of environmental protection or other persons acting under sections 3704.03 and 3704.04 of the Revised Code shall not be used as evidence in civil actions nor create any presumption of law or finding of fact which shall inure to or be for the benefit of any person other than the state, and sections 3704.01 to 3704.07 of the Revised Code do not create, enlarge, or abrogate existing private rights. Nothing in Chapter 3704 of the Revised Code shall be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor."

The last sentence in R.C. 3704.09 clearly provides that nothing in this chapter shall impair a person's right to damages or to maintain an action at common law. Thus, common law rights and remedies are preserved, which would include the action in the cause *sub judice* for money damages caused by nuisance.[2]

Another indication that the General Assembly intended that common law rights and remedies be preserved is found in the first sentence of R.C. 3704.09. It provides that injured parties are precluded from using the findings of the EPA in civil actions. Thus, even if a complainant pursued an administrative remedy with the EPA and was successful, he could not use that decision in a civil action. Thus, requiring appellants to pursue an ad-

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[1] Although R.C. 3704.09 was argued, the court's opinion did not mention it.

[2] Appellees rely upon *State, ex. rel. Brown*, v. *Rockside Reclamation*, (1976), 47 Ohio St. 2d 76 [1 O.O.3d 46]. This case concerned the authority of the Attorney General to file a suit against a landfill for violation of R.C. 3767.13, a general nuisance statute. The case *sub judice* is an action for money damages brought by private individuals and concerns R.C. 3704.09. Because of these factual differences, *Rockside* is inapposite.

ministrative remedy would be costly and futile. Further support for our conclusion is found in R.C. 3704.03. This lengthy section codifies the powers of the director of the EPA, none of which includes awarding money damages.

Based upon the legislative directives in R.C. 3704.09, we hold that pursuant to this section, it is not necessary for a private citizen to seek and exhaust his administrative remedies with the EPA before initiating a civil action for money damages caused by a sewage treatment plant. Thus, summary judgments were improperly granted for failure to exhaust administrative remedies.

II

Summary judgment was also granted to the city of Aurora in each case on the additional ground that the suit was barred by the doctrine of sovereign immunity. Appellants contend that the defense of sovereign immunity should not be available to the city.

The historical development of the doctrine of sovereign or governmental immunity of municipal corporations has been discussed in *Haas* v. *Akron* (1977), 51 Ohio St. 2d 135, 140 [5 O.O.3d 110] (William B. Brown, J., dissenting), and *Hack* v. *Salem* (1963), 174 Ohio St. 383, 391 [24 O.O.2d 34] (Gibson, J., concurring in judgment). Consequently, it is unnecessary for us to repeat this background. However, for a perspective on the current situation, it will be helpful to summarize the operation of the doctrine.

A municipal corporation has been characterized as being both a subdivision of the state and also a corporate entity. Therefore, liability for negligence, and the defense of immunity, have been dependent upon the classification of the municipal function as proprietary or governmental. Traditionally, municipal corporations have been immune from liability in the performance of their governmental functions, unless as otherwise provided by statute. See, *e.g.*, *Broughton* v. *Cleveland* (1957), 167 Ohio St. 29 [4 O.O.2d 1]. However, the defense of immunity has not been available to a municipal corporation in the performance of proprietary functions. See, *e.g.*, *Sears* v. *Cincinnati* (1972), 31 Ohio St. 2d 157 [60 O.O.2d 113].

Attempts to classify municipal functions into these two categories have caused confusion and unpredictability in the law. "[T]he classification of particular functions of municipalities has been difficult and frequently leads to absurd and unjust consequences." *Hack*, *supra*, at 394. Furthermore, "it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality." *Eversole* v. *Columbus* (1959), 169 Ohio St. 205, 208 [8 O.O.2d 167]. Thus, this "bramble bush," as described in *Hack*, *supra*, deserves clarification with the formulation of a definite rule of law.

Furthermore, as we consider the viability of the doctrine, we are mindful of its unjust results. Many innocent injured victims have been precluded from recovering damages from municipalities because of sovereign immunity from liability for their negligence in the performance or nonperformance of

governmental functions. Clearly, the municipality is better able to bear the cost of an injury it causes than the individual victim. The municipality should be run with the same care and circumspection as a business, protecting itself in the same manner from liability incurred by its servants. A municipality is able to obtain liability insurance and is able to spread the cost among the taxpayers.

As aptly stated by Justice William B. Brown in *Haas, supra*, "the judicially created doctrine of sovereign immunity is a legal anachronism which denies recovery to injured individuals without regard to the municipality's culpability or the individual's need for compensation." *Id.* at 145. Because Ohio's sovereign immunity for municipalities was judicially created (see *State* v. *Franklin Bank of Columbus* [1840], 10 Ohio 91; *Western College of Homeopathic Medicine* v. *Cleveland* [1861], 12 Ohio St. 375; and *Thacker* v. *Bd. of Trustees of Ohio State Univ.* [1973], 35 Ohio St. 2d 49, 67-68 [64 O.O.2d 28] [William B. Brown, J., dissenting]), it can be judicially abolished. (See *Sears, supra*, at 162.) When we considered sovereign immunity last year, we noted that only six other states adhered to the traditional common law immunity doctrines. *Schenkolewski* v. *Metroparks System* (1981), 67 Ohio St. 2d 31, 38 [21 O.O.3d 19]. *Stare decisis* alone is not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results. Therefore, we join with the other states in abrogating the doctrine.

We hold that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant. A municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts. To the extent that they are inconsistent with this opinion, *McKee* v. *Akron* (1964), 176 Ohio St. 282 [27 O.O.2d 197], and *Haas* v. *Akron* (1977), 51 Ohio St. 2d 135 [5 O.O.3d 110], are overruled.

Therefore, sovereign immunity is not available as a defense for the city of Aurora. Because summary judgments were improperly granted, appellants will have the opportunity to prove their allegations when the causes are remanded for trials on the merits.

Accordingly, the judgments of the court of appeals are reversed and the causes are remanded.

Judgments reversed and causes remanded.

W. Brown, Sweeney and C. Brown, JJ., concur.

Locher, Holmes and Krupansky, JJ., concur in part and dissent in part.

DUE FOR TAXES ON THE HEREIN DESCRIBED PROPERTY IN LAKE COUNTY, OHIO, FOR TAX YEAR 1977

KONDRAT ROBERT J
4 TRACT
1 LOT
EUCLID-CHARDON RD ALOT
FT 0.00AC 2.38

1977 KONDRAT ROBERT J
29121 CHARDON RD
-019 WICKLIFFE OHIO44092

Bill Brown Title

CURRENT TAX	AG	PRIOR TAX	TOT. CUR. TAX DUE	INTEREST
30138		27124	28904	
B. CREDIT	CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.	
		1780		
PENALTY		TOTAL DUE	ADJ. TOTAL DUE	
3014		28904		

MABLE P. JOHNSON, TREASURER

KONDRAT ROBERT J
4 TRACT
1 LOT
EUCLID-CHARDON RD ALOT
FT 0.00AC 2.38

DETACH THIS IS YOUR RECEIPT

31A-008E-00-019 PARCEL
FIRST HALF 4,260 LAND
TAX YEAR 1976 9,600 BLDG
TAXPAYER'S RECEIPT 13,860 TOTAL
HOMESTEAD REDUCED VALUE

WILLOUGHBY HILLS CTY

NET CURRENT TAX	TOT. CUR. AMT. DUE	INTEREST
27124	28904	
CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.
1780		
	TOTAL DUE	ADJ. TOTAL DUE
	28904	

MABLE P. JOHNSON, TREASURER

Kondrat, R. J.
1
PAID
MABLE P. JOHNSON
County Treas.

JAN 21 1977

DETACH THIS IS YOUR RECEIPT

31A-8E-19 PARCEL
FIRST HALF 2130 LAND
TAX YEAR 1976 7680 BLDG
TAXPAYER'S RECEIPT 9810 TOTAL
HOMESTEAD RED VALUE

NET CURRENT TAX	TOT. CUR. AMT. DUE	INTEREST
191 99	209 79	
CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.
17 80		
		ADJ. TOTAL DUE
	209 79	